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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

TOWN OF BELMONT,
Petitioner

v.

ELIZABETH DOLE, SECRETARY OF THE
UNITED STATES
DEPARTMENT OF TRANSPORTATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Edward A. Haffer
Sheehan, Phinney, Bass & Green
1000 Elm Street
Manchester, New Hampshire 03101
(603) 627-8115
Counsel for Petitioner

41 pp

QUESTION PRESENTED

In refusing to find whether or not there is a feasible and prudent alternative to building a highway through an archaeological district listed in the National Register of Historic Places, has the Secretary of Transportation violated federal highway statutes?

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PARTIES BELOW

At the United States Court of Appeals for the First Circuit, Defendant/Appellant was Elizabeth Dole, Secretary of the United States Department of Transportation; and Plaintiffs/Appelles were the Towns of Belmont (N.H.) and Tilton (N.H.). Amicus curiae briefs favoring the Secretary's position were filed by the States of Hawaii, Virginia, Illinois, and Pennsylvania.

OPINIONS BELOW

The First Circuit's opinion is reported at 766 F.2d 28, and appears in the Appendix (see p.11). The First Circuit reversed the decision of the United States District Court for the District of New Hampshire; the District Court's opinion was not generally reported, but appears in the Appendix (see p.23).

JURISDICTION

The judgment of the First Circuit was dated and entered on June 27, 1985; no rehearing was sought. This petition has been brought within ninety days of that judgment. The Supreme Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATION INVOLVED

The principal statutes involved are §18(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C. §138), and a virtually identical provision, §4(f) of the Department of Transportation Act of 1966 as amended (49 U.S.C. §303); here these statutes will be referred to simply as §§18(a) and 4(f), the latter providing:

> (a) *It is the policy of the United States that special effort should be made to preserve* the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and *historic sites.*
>
> * * *
>
> (c) *The Secretary may approve a transportation program or project requiring the use of* publicly owned land of the public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance, or *land of an*

historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) *only if*–

(1) *there is no prudent and feasible alternative to using that land;* and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use. [Emphasis added.]

See the appendix (p.37) for the exact language of §18(a). A third statute involved is §106 of the National Historic Preservation Act of 1966 (16 U.S.C. §470f), which provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State... shall, prior to the approval of the expenditure of any Federal funds on the undertaking... take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation... a reasonable opportunity to comment with regard to such undertaking.

The principal regulation involved is the Secretary of Transportation's archaeological regulation, 23 C.F.R. §771.135 (f)(1), which provides:

> Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction, unless the [Federal Highway] Administration, after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, determines that the archeological resource is important chiefly for the information it contains and has minimal value for preservation in place. Such archeological resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 C.F.R. Part 800.

STATEMENT OF THE CASE

Both §§18(a) and 4(f) provide in essence that the federal government should make a "special effort" to "preserve" historic sites and that these sites may not be used for transportation projects unless there is no "feasible and prudent alternative" to their use. Yet, without any attempt at all to look for a "feasible and prudent alternative," the Secretary of Transportation approved the building of a highway through and archaeological district listed in the National Register of Historic Places and located in the New Hampshire towns of Belmont and Tilton. The Secretary relied on her own archaeoligical regulation, which purports to allow her to avoid the statutory feasible-and-prudent-alternative requirement in certain cases. Believing the regulation invalid, the towns brought suit in the United States District Court for the District of New Hampshire, jurisdiction being based on 28 U.S.C. §1331 (federal question). Finding a violation of §§18(a) and 4(f), the District Court enjoined construction until there was statutory compliance, and struck down the regulation as void and contrary to §§18(a) and 4(f). The Secretary appealed, and the First Circuit reversed, holding that the regulation was not contrary to §§18(a) and 4(f) and was consistent with §106 of the National Historic Preservation Act of 1966.

In more detail, the essential facts are as follows. The Secretary approved the building of a new highway, 12 miles long and 4 lanes wide, from Franklin through Tilton and Belmont to Laconia, all municipalities in New Hampshire. The highway would be a bypass from the existing U.S. 3-N.H. 11. Within the path of the proposed bypass is the Lochmere Archaeological District, a 90-acre tract which in November 1982 was listed by the United States Department of Interior in the National Register of Historic Places as a district of State importance. As admitted by the Secretary, the District has prehistoric and historic significance, preserving 13 sites of prehistoric Native American occupation and 18 sites of Euro-American settlement and industry. Also as admitted by the Secretary, the District, in satisfaction of National Register criteria for evaluation (36 C.F.R. §60.4), evidences "[t]he quality of significance in American history, archaeology, ... and culture

[which] is present in *districts*... that possess integrity of location, design, setting, material, workmanship, feeling, and association, and... *that are associated with events that have made a significant contribuion to the broad patterns of our history*... [and] that have yielded, or may be likely to yield, information important in prehistory and history." (Emphasis added.) More particularly, the "*district* is significant for its *historical association* with the early settlement of Belmont and Tilton, and for its *association* with the early industrial use of New Hampshire's major rivers." (Emphasis added.)

The Secretary accepted a draft environmental impact statement (DEIS) in October 1977, and a final environmental impact statement (FEIS) in June 1981. Neither contained any statement analyzing whether there was a feasible and prudent alternative to the proposed highway. The explanation for the omission was that the proposed highway would "not use land of historic or archaeological significance" and "[t]herefore... the selected alignment... [would] not require a Section 4(f) evaluation." However, the Secretary later conceded that, "[a]lthough the listing of the Lochmere Archaeological District in the National Register of Historic Places occurred only as of November 1, 1982, the reasons for the listing -- its historic and archaeological significance -- were just as real and valid in October 1977, when the DEIS was accepted, and in June 1981, when the FEIS was accepted."

In any event, by letter of December 16, 1982, Belmont and Tilton told the Secretary of the District's listing in the National Register, and pointed out that "as a matter of law a Section 4(f) statement must now be prepared." That message was repeated by letter of April 7, 1983. However, despite the repeated warnings, the Secretary refused to prepare the statement, saying that under her archaeological regulation none was necessary.

The towns sued on May 9, 1983; the District Court's permanent injunction was entered on August 20, 1983; and the First Circuit's reversal was entered on June 27, 1985.

REASONS FOR GRANTING THE WRIT

THE FIRST CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Calling §§18(a) and 4(f) "clear and specific directives," this Court has said that the statutory "language is a plain and explicit bar for construction of highways through parks [and in this case, historic sites] -- only the most unusual situations are exempted." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411, (1971). The Court has further said:

> ...These statutes prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks [and here, historic sites] if a "feasible and prudent" alternative route exists. If no such route is available, the statutes allow him to approve the construction through parks [or historic sites] only if there has been "all possible planning to minimize harm" to the park [or historic site]. [At 405.]

Overton Park is unquestionably the leading case for construing §§18(a) and 4(f), and its holding was pressed hard by the appellee towns. Yet the First Circuit's decision does not even cite *Overton Park*, let alone follow it. The avoidance is total. The First Circuit said, however, "Before this court, appellees have argued vigorously that the [Secretary's archaeological] regulation departs from the 'plain meaning' of the statute. Their argument is a strong one." (Appendix, p.12). Much of that strength stems, of course, from *Overton Park*.

It stems also from the repeated expression of Congressional will. The very fact that §§18(a) and 4(f) are virtual duplicates of each other underscores the importance that Congress has attached to their substance. Moreover, §4(f), which was originally enacted in 1966, was reenacted without substantive change in 1983. See Pub. L. 97-449, Jan. 12, 1983, 96 Stat. 2419, recodified at 49 U.S.C. §303. Certainly, had Congress wished to weaken §4(f), it had, in this reenactment, a perfect opportunity to do so. That it in

fact did not, however, unmistakably confirms that the substance of § 4(f) continues in full vigor. Indeed, it is hard to imagine how Congress could have expressed itself more forcefully: it created not merely one statute, but two, imposing the feasible-and-prudent-alternative requirement; and, as if duplication were not enough, it then reenacted one of the statutes, giving this requirement, literally, a new vote of approval.

The Secretary's archaeological regulation, which took effect in 1980, utterly ignores one half of the statutes' "clear and specific directives." It avoids altogether the first of the two statutory conditions, wrongly treating the second one as if it were the only one. That is, the regulation has the Secretary bypass the feasible-and-prudent-alternative requirement, and go directly to the requirement for a plan to minimize harm to protected sites. Put simply, it has her go to second base without touching first.

The regulation wrongly implies that, as long as the Secretary has a minimizing-harm plan, she has the option of approving a project over a protected site even if there *is* a feasible and prudent alternative. As a matter of law, however, she has no such option. She has only an obligation: she may not approve any project over a protected site unless it is first established that there is *no* feasible and prudent alternative. If there is any, she must use it. If not, she may then, and only then, proceed to a minimizing-harm plan for use of the protected site. *Overton Park, supra* at 405.

Further proving the invalidity of the regulation is its reversal of statutory history. The regulation would undo the Congressional amendment that created § 18(a), and regress to the statute's original, weaker version. The predecessor of § 18(a) called only for a minimizing-harm plan, which included merely "consideration" of alternatives:

> ... [T]he Secretary shall not approve... any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land,

> to minimize any harm to such park or site resulting from such use. [Pub. L. 89-574, §15(a), Sept. 13, 1966, 80 Stat. 771.]

Contrast that version with the much tougher, current version (Pub. L. 90-495, §18(a), Aug. 23, 1968, 82 Stat. 823). By ignoring this current, strict version and regressing to the original, weaker version, the regulation purports to adopt what Congress has discarded. It thus diametrically contradicts Congressional will.

The First Circuit's decision overlooks not only vital precedent and statutory history, but also vital fact: the importance of Lochmere is "associational" as well as archaeological. The National Register of Historic Places Inventory Nomination Form provides for the following categories of classification: district, building, structure, site, and object. If the historic value of Lochmere were, as the First Circuit suggests, limited to its archaeological artifacts, then its National Register classification would have been under "objects." In fact, however, that was not the classification; as its name makes plain, the Lochmere Archaeological District was classified as a "district." It bears repeating, moreover, that the Secretary has admitted that the *District* has prehistoric and historic signifcance, preserving 13 *sites* of prehistoric Native American Occupation and 18 *sites* of Euro-American settlement and industry. Also as admitted by the Secretary, the *District,* in satisfaction of National Register criteria for evaluation, evidences "[t]he quality of significance in American history, archaeology,...and culture [which] is present in *districts* ... that possess integrity of location, design, setting, material, workmanship, feeling, and association, and ... *that are associated with events that have made a significant contribution to the broad patterns of our history.*" (Emphasis added.) More particularly, the "*district* is significant for its *historical association* with the early settlement of Belmont and Tilton, and for its *association* with the early industrial use of New Hampshire's rivers." (Emphasis added.) Referring to the National Register criteria quoted above, Mrs. Hoornbeek, an archaeologist for the United States Forest Service, testified as follows:

> To me Criterion A is a location, the district itself has been important in our history and prehistory. Not just the artifacts under the ground but rather the site itself is unique.

See *Benton Franklin Riverfront Trailway v. Lewis,* 701 F.2d 784, 788 (9th Cir. 1983) (The Secretary of Transportation's "reading of §4(f) is entirely too restrictive and lacks logic. There would be no sense in allowing the destruction and removal of structures on land and then determining whether the 'land' will be used by the proposed federal action. The land will often lose its historic significance once the object is removed. Hence, we conclude that the removal of the Old Truss Bridge... would be a use of 'land from an historic site' and therefore §4(f) of the Department of Transportation Act must be satisfied.")

Section 106 of the National Historic Preservation Act, on which the First Circuit relied, was not properly reconciled with §§18(a) and 4(f). The preservation statute is one of general application, relating to the head of "any" federal agency in "any" federally assisted undertaking. It requires the agency head to "take into account the effect of the undertaking on any district..." However, when applied to the Secretary of Transportation and properly reconciled with the much more specific provisions of §§18(a) and 4(f), the general requirement to "take into account" crystallizes into the specific requirement to look for feasible and prudent alternatives.

The Secretary's archaeological regulation simply casts aside the feasible-and-prudent-alternative requirement. So defying the statutes, it should not be upheld. This Court has "made it clear that 'The power of an administrative officer... to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.' " *Dixon v. United States,* 381 U.S. 68, 74 (1965). An administrative agency may not "adopt regulations that are inconsistent with the statutory mandate... [I]ts 'interpretation' of the statute cannot supersede the

language chosen by Congress." *Mohasco Corp. v. Silver,* 447 U.S. 807, 825 (1980). See also *United States v. Larionoff,* 431 U.S. 864 (1977); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976).

This case has national significance. The First Circuit observed that "the vast number of archeological sites that may exist in some areas (Hawaii, for example) suggests that the district court's view, if generalized, could significantly delay or halt road building, improvement, or maintenance in at least some states without significantly futhering any preservationist value." (Appendix, p.19.) It is, however, this same "vast number of archeological sites" that requires the preservation prescribed by Congress in §§18(a) and 4(f). That Congressional prescription – it must be stressed, finally – is not absolutist. It is not, "Never build here." It is, rather, moderate; it is, "If feasible and prudent, build elsewhere. If not, build here with appropriate plans to minimize harm." The First Circuit's suggestion of halts to road building is, therefore, overstatement. (Appendix, p. 19.) Its decision should be reversed, and the "clear and specific directives" of §§18(a) and 4(f) *(Overton Park, supra* at 411) should be followed.

Edward A. Haffer
Sheehan, Phinney, Bass & Green
1000 Elm Street
Manchester, N.H. 03101
(603) 627-8115

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 83-1871

TOWN OF BELMONT, ET AL.,
Plaintiffs, Appellees,
v.
ELIZABETH DOLE, UNITED STATES SECRETARY OF TRANSPORTATION,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
(Hon. Martin F. Loughlin, U.S. District Judge)

Before
Coffin, Breyer and Torruella,
Circuit Judges.

June 27, 1985

BREYER, *Circuit Judge.* Section 4(f) of the Department of Transportation Act says in part that the Secretary of Transportation may not approve a project

> requiring the use of... land of an historic site of national, State, or local significance (as determined by the Federal, State or local officials having jurisdiction over the ... site)

unless there is no "prudent and feasible alternative to using the land." 49 U.S.C. §303 (*See* Appendix for full text.) *See also* 23 U.S.C. §138. In October 1980 the Secretary promulgated a set of regulations that, in part, concerns historic sites of archeological value. The relevant paragraph said that

> archeological sites on or eligible for inclusion on the National Register [fall within the scope of §4(f)'s definition]... unless the Administration, after consultation with the state Historic Preservation Officer and the advisory Council on Historic Preservation, determines that the archeological resource is importatnt chiefly for the information it contains and has minimal value for preservation in place... [In that event the] archeological resources... may be recovered in accordance with a resource recovery plan developed in compliance [with a different set of regulations, contained in 36 C.F.R. Part 800]...

23 C.F.R. §771.135(f) (1) (1984). (*See* Appendix for full text). The issue in this case is whether this "archeological regulation" is consistent with the statute. The district court held that is was not, declared the regulation void, and issued an injunction based on that finding. Before this court, appellees have argued vigorously that the regulation departs from the "plain meaning" of the statute. Their argument is a strong one. Nonetheless, having looked into the matter in some depth, we conclude that the regulation does not conflict with the statute's language, properly understood, and that the "archeological regulation" in fact furthers the statute's preservationist goals. Hence, we reverse the district court's decision.

I
A

Since the district court, in effect, declared the regulation invalid on its face, we shall examine it in light of the government's version of the facts. They included the following: The federal Department of Transportation (DOT) and the New Hampshire Department of Public Works and Highways wish to build a twelve-

mile, four-lane bypass to relieve highway congestion along a corridor of U.S. 3-N.H. 11 between Franklin and Lcaonia, New Hampshire. The bypass route they have proposed runs through the towns of Tilton and Belmont. In 1977 they published a draft environmental impact statement. In 1976, 1978 and 1980 various federal and state officials involved with the highway project surveyed the proposed bypass route to determine whether it contained any "historic sites". As a result of the 1978 survey, New Hampshire found and created a special zone, the Lochmere Archeological District. The District consists of about 90 acres of land containing Indian and colonial settlement sites with buried artifacts but no historic buildings. As New Hampshire's State Preservation Officer wrote, when he successfully applied to have the National Park Service list the District in its National Register of Historic Places, the site's significance is "strictly archeological," consisting of the data it contains. DOT consulted relevant state and federal agencies, all of which have agreed with DOT about this characterization. DOT has agreed that

> [The state and federal highway agencies] will develop an appropriate data recovery program, which meets the approval of the NH State Historic Preservation Office and Advisory Council on Historic Preservation, for any sites determined to be eligible for inclusion in the National Register.
>
> [The state and federal highway agencies] will conduct the data recovery at the earliest possible date under the supervision of an archeologist whose qualifications have been determined acceptable by the State Historic Preservation Office.

Together with DOT, these agencies are now developing a satisfactory "retrieval" plan that will preserve significant data and artifacts, though not necessarily where now buried.

B.

In considering the "archeological regulation's" lawfulness, it is important to keep in mind the following 'legislative' background: DOT promulgated the regulation pursuant to its general rulemaking power to implement Congressional transportation

statutes, *see* 23 U.S.C. §315. DOT intended the regulation to further, not only the purposes of §4(f), but also those of a different statute (enacted the same day as §4(f), the National Historic Preservation Act of 1966, 16 U.S.C. §§470 *et seq.* Section 106 of that Act requires DOT (and other federal agencies) to "take into account the effect" of any "undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register," and to give the "Advisory Committee on Historic Preservation... a reasonable opportunity to comment" on the "undertaking." *Id.* §470f. (*See* Apendix for full text.) When promulgating its "archeological regulation," DOT explained how it reconciled and fulfilled the purposes of both §4(f) and the Preservation Act, as follows:

> A related problem has arisen with respect to archeological sites which are treated as historic sites under both section 4(f) and the National Historic Preservation Act. Frequently, the consultation required by section 106 [of the NHPA, 16 U.S.C. §470f] results in a determination that data recovery is the appropriate form of mitigation for the archeological site. Such determinations are typically made when the recovery of the material contained in or on the site renders more valuable information than leaving such material at the specific location. Applying section 4(f) to archeological sites where data recovery is appropriate would impose the section 4(f) test to sites for which all interested agencies have agreed that removal of the archeological material is in the best public interest. This regulation incorporates current DOT policy by applying section 106 and section 4(f) to archeological sites sequentially. If data recovery under section 106 is appropriate, then section 4(f) would not apply, since recovery results in the removal of materials which make the site significant for purposes of section 4(f). It should be noted that section 4(f) continues to apply to archeological sites on or eligible for the National Register where the site has significance for reasons other than the materials contained.

45 Fed. Reg. 71,976 (1980). The "archeological regulation" thus says in essence that DOT, in accordance with procedures set out elsewhere (in 36 C.F.R. Part 800) will consult with state and

federal preservation officials, both to determine the applicability of its "archeological regulation" and to develop an appropriate retrieval plan. *See* 36 C.F.R. Part 800(1984)(implementing the Preservation Act). DOT promulgated the initial version of this regulation in 1980, as part of a far larger proposed regulation dealing with §4(f). DOT apparently received 196 comments from interested parties. 45 Fed. Reg. 71,968 (1980). DOT then summarized and discussed significant comments when promulgating the final regulation. Judging from this discussion, no environmental group or archeological group seriously opposed the "archeological regulation" subsection.

C.

Our task on this appeal is to determine the lawfulness of an agency's "legislative rule" – a rule that is lawful if "reasonable" and not "contrary" to the relevant statutes. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton v. Francis*, 432 U.S. 416, 424-26(1977); *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100, 106 (1st Cir. 1984); *see generally* 2K. Davis, *Administrative Law Treatise* §7:8(1979). We consider that rule in light of the factual assumptions set forth in part IA, above, namely that DOT and others have fully complied with the rule and with related regulations. Indeed, we consider its lawfulnes on the still more favorable assumption that the relevant State official "having jurisdiction" (The State Historic Preservation Officer), the relevant federal preservationist agencies (including the Advisory Committee on Historic Preservation established under the Preservation Act), and DOT all agree about both the regulation's applicability and the likely creation of a satisfactory "retrieval" plan. We also consider the rule in light of its history set forth in part IB above, namely that the regulation is aimed at serving the purposes of both §4(f) and the Preservation Act.

II

Given our assumptions, we conclude that the "archeological regulation" is lawful. It is consistent with §4(f), because neither the language nor the purpose of that section requires DOT to determine whether there exists a "prudent and feasible" alternative to use of the land that the regulation describes. Thus §4(f) does not require DOT to choose any such alternative route instead of the land in question.

First, as a matter of language, we fail to find any necessary conflict between statute and regulation. The statute applies to "the use of... land of an historic site of national, State, or local significance." The regulation picks out those archeological sites whose significance lies only in the data they contain that will be at least equally well preserved outisde the site. Once the data is removed, the land lacks the necessary "significance." The process of removal itself cannot be considered an *adverse* "use" of the site as long as it does not injure but preserves the objects in question. And, the word "use" in the statute referes to a use that is *adverse* in terms of the statute's preservationists purposes, a "use" that might *"harm"* the resources the statute seeks to protect, 49 U.S.C. §303(c)(2) (emphasis added). See *Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982) ("the term 'use' is... not limited to the concept of physical taking, but includes areas that are significantly adversely affected by the project"); *D.C. Federation of Civic Associations v. Volpe,* 459 F.2d 1231, 1239 (D.C.Cir.) ("harm" to recreational park under §4(f) encompasses "noise, air pollution and general unsightliness" that might "dissipate its aesthetic value, crush its wildlife [or] defoliate its vegetation") *cert. denied* 405 U.S. 1030 (1972); *Nashvillians Against I-440 v. Lewis,* 524 F. Supp. 962, 976 (M.D. Tenn. 1981) (constructive "use" of historic property under §4(f) "occurs only where the claimed harm will affect the *historic* value or quality of the properties" and where "the purposes for which such properties are protected [are] threatened by the 'use')" (emphasis in original). Indeed, a contrary view of the word "use" would perversely forbid DOT from helping to preserve the environment in any instance in which a project helps, rather than hurts, the envornment. (Imagine a DOT project planting trees along the edge of a port, or reconstructing a bridge so

as to help free an estuary of pollution making it better fit for wildlife.) *Cf. Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978) ("in interpreting the words of a statute," courts have "some scope for adopting a restricted rather than a literal or usual meaning of words where acceptance of that meaning would lead to absurd results... or would thwart the obvious purpose of the statute")

Second, the regulation is consistent with the purpose of §4(f) – a purpose described in its opening sentence as requiring the United States to make a "special effort... to preserve the natural beauty of the country-side and public parks and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. §303(a). *See generally,* Gray, *Section 4(f) of the Department of Transportation Act,* 32 Md. L. Rev. 327 (1973). As courts and commentators have noted, historic sites, particularly archeological sites, raise special problems, for unlike sea, parks and recreation lands, many of them are in private hands, see *Stop H-3 Association v. Coleman,* 533 F.2d 434, 442 n.15 (9th Cir.) *cert. denied,* 429 U.S. 999 (1976); and private owners are not necessarily obligated to preserve the sites' historic or archeological value. *See, e.g.,* Lovis, "A Case Study of Construction Impacts on Archeological Sites in Michigan's Inland Waterway," *Journal of Field Archeology* (1978) (in area studied, only two percent of the destruction of all archeological sites was due to federal program; thirty-eight percent, to commercial ventures; and the rest, to other private developers). Choosing an "alternative" route for a road in order to avoid a public park in all likelihood helps to preserve the park; choosing an "alternative" route for a road in order to avoid an archeological site may well harm the site, at least where the site's only value lies, say, in its buried artifacts, where road building is acompanied by a carefully designed plan to retrieve them, and where the alternative is to leave the site in the hands of private owners free to ignore, or even to harm, its archeological value.

Recognizing this fact, DOT, the Advisory Council on Historic Preservation, and state preservationist agencies have developed an archeological preservationist program, embedded in regulations promulgated pursuant to the Historic Preservation Act,

see 36 C.F.R. Part 800(1984) and the regulation at issue here. We are told by four states filing amicus briefs that this program works well. Pennsylvania, for example, in a brief signed by both counsel to its Department of Transportation and counsel to its Historical and Museum Commission, notes that the state contains over 11,000 archeological sites, and explains how the federal program has helped to advance archeological objectives. It concludes,

> The recovery program created by the Advisory Council Regulations [36 C.F.R. Par 800], which are necessarily triggered by [the "archeological regulation"] has operated successfully in Pennsylvania, fostering cooperation between the Department of Transportation and the Historical and Museum Commission and serving the needs and objectives of both agencies.

To strike down the "archeological regulation" as contrary to §4(f) would have the perverse effect of interfering with §4(f)'s preservationist objective, for it would forbid DOT to help retrieve and preserve the buried artifacts as long as the road could be put elsewhere. The state of Illinois, in its amicus brief, describes the possibility as follows:

> If the District Court's decision is upheld, the Department will, no doubt, be faced with the anomalous situation of discovering a significant site which should be salvaged so that the information it contains can be professionally collected, published, and displayed. Instead of completing this task and contributing to the body of knowledge associated with archeology, the Department will be faced with the mandate of Section 4(f) to avoid the site unless no feasible and prudent alternative exists. If such an alternative is found, the site will then be abandoned. The site will be left, in most cases, in private ownership with no absolute restraints against total destruction or vandalism...

If the District Court's decision is not reversed, the Department will be required to shift the focus in its archeological program from its present standard of maximum preservation of valuable

information to one of finding significant sites so that they can be avoided and possibly ruined. Instead of serving the historical preservation goal stated in Section 4(f), the Department would be assisting in the loss of irreplaceable archeological resources.

Even if this dismal picture is overdrawn, the vast number of archeological sites that may exist in some areas (Hawaii, for example) suggests that the district court's view, if generalized, could significantly delay or halt road building, improvement, or maintenance in at least some states without significantly furthering any preservationist value. (Here, for example, appellee townships, while anxious to stop the road, have no particular expertise or institutional interest in archeological preservation.)

Third, the "archeological regulation," viewed in the context of its accompanying and cross-referenced regulations promulgated under the Preservation Act, *see* 36 C.F.R. Part 800 (1984), contains, as we interpret it, sufficient substantive and procedural safeguards to prevent its being applied in a manner that would undercut its, and §4(f)'s, preservationist goals. It does not apply and §4(f) does apply, for example, if the archeological items give a particular site a special "in place" historical or archeological significance. (Consider, for example, the Civil War battle artifacts at Gettysburg.) The regulation also would not apply if it turns out that the related agencies cannot develop a "resource recovery plan" that would remove and preserve the significant items. Finally, we consider here the regulation as applied to a site where *"all"* state and federal officials with "jurisdiction" *agree* that site meets the regulation's definition. (DOT says that they are in agreement; and the district court struck down the regulation on that assumption). We need not now decide how, or whether, the regulation can apply should DOT, for example, believe the site's archeological elements lack "in place" value but the State Historical Preservation Officer or the Advisory Committe on Historic Preservation disagrees. (We note authority, however, for the proposition that a claim by *one* of the state or federal officials with jurisdication that a particular site falls within §4(f)'s scope is sufficient to invoke the protection of that statute, *Stop H-3 Association v. Coleman*, 533 F.2d at 441-42).

III

We note that appellees seek to dispute one of our factual assumptions. They argue that DOT has not fulfilled the requirements laid down in the "archeological regulation" and related regulations. DOT replies that it has done so. The record is consistent with DOT's claim. Nonetheless, this is a matter the district court should consider in the first instance.

The decision of the district court is

Reversed and the case is remanded for proceedings consistent with this opinion.

APPENDIX

Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303:

§303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the Country-side and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an hisotric site of national, State, or local significance, or land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if —

(1) there is no prudent and feasible alternative to using that land, and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. §470f:

§470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal Agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i and 470n of this title a reasonable opportunity to comment with regard to such undertaking.

DOT's "Archeological Regulation," 23 C.F.R. 771. 135(f) (1984):

(f)(1) Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction, unless the Administration, after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, determines that the archeological resource is important chiefly for the information it contains and has minimal value for preservation in place. Such archeological

resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 CFR Part 800.

(2) For sites discovered during construction, where preservation of the resource in place is warranted, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made and the review process, including the consultation with other agencies, will be shortened as appropriate.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Town of Belmont, et al.
v.
Elizabeth Dole, et al.
#C83-241-L

ORDER

In recent years, concerted efforts have been made to preserve this nation's heritage as reflected in historical sites of national, state and local significance. The Congress has declared the preservation of such sites to be a matter of national policy and has enacted various statutes designed to halt their needless and sometimes wanton destruction. In this case, the Court is primarily concerned with two such statutes, specifically §4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. §303[1] and §18(a) of the Federal-Aid Highway Act of 1968, as amended, 23 U.S.C. §138[2].

Succintly, these statutes prohibit the Secretary of Transportation from authorizing federal funds to finance the construction of a highway through an historic site if a prudent and feasible alternative can be found. If no such alternative can be found, the statutes require all possible planning to minimize harm to the historic site.

The towns of Belmont and Tilton, New Hampshire (plaintiffs) seek an injunction to block construction of a proposed bypass of US 3-NH 11 through the Lochmere Archaelogical District until such time as Secretary of Transportation Elizabeth Dole, in compliance with §4(f), determines that there is no prudent and feasible alternative to the use of land from the District. The Lochmere Archaelogical District has been

1 §4(f) of the Department of Transportation Act was originally codified as 49 U.S.C. §1653(f). Section 7 (b) of Pub. L. 97-449, January 12, 1983, 95 Stat. 2444 repealed 49 U.S.C. §1653 (f) and recodified that statute—without substantive change – as 49 U.S.C. §303.

2 Whereas 49 U.S.C. §303 and 23 U.S.C. §138 utilize essentially identical language, and, whereas, a violation of one statute is also a violation of the other, the court will hereinafter refer to both statutes as "section 4(f)", the term commonly used by other courts and agencies.

included on the National Register of Historic Places since November of 1982.

The Secretary of Transportation maintains that she is not required to make a determination that there is no prudent and feasible alternative to the use of land from the Lochmere District. Defendant's position is grounded upon 23 C.F.R. §771.135(f)(1) which provides that §4(f) does not apply to historic sites primarily important for the information or artifacts they contain when the Secretary of Transportation – after consultation with the State Historic Preservation Officer and the Advisory Council for Historic Preservation – determines that preservation of the site in place is not warranted. The plaintiffs have requested a declaratory judgment to the effect that 23 C.F.R. §771.135 (f)(1) is void.

Simply stated, the primary issue before this Court is whether §4(f) was intended to protect the Lochmere Archaeological district, an historic site primarily important for the archaeological artifacts it contains. Jursidiction is based upon 28 U.S.C. §1331.

I. FACTUAL BACKGROUND

The proposed bypass of US 3-NH 11 represents the culmination of nearly thirty years of planning. The bypass is considered necessary to alleviate congestion on the current roadway and to prevent the sometimes fatal accidents which can occur as a result of that congestion. The project, as proposed, would supplement the existing US 3-NH 11 roadway with a four-lane limited-access highway through a generally rural area. Within the particular "corridor" selected for the bypass, numerous routes have been considered, but, from the evidence presented, it appears all roads led to Lochmere.

A draft Environmental Impact Statement on the project was published in 1977. In the interim from publication of that Draft through preparation of the Final Enviromental Impact Statement, various state and federal officials involved with the project attempted to ascertain whether there were any historic properties along the proposed route which would require the preparation of a

"§4(f) statement". Intensive surveys were conducted in the area of Lochmere in 1976, 1978, and 1980. As a result of the 1978 survey, a 500 foot wide zone starting at the tip of Winnisquam Lake and extending to and along Silver Lake was nominated for inclusion in the National Register of Historic Places in 1980.

The significance of the Lochmere Archaelogical District is, according to the nomination forms, strictly archeological. The District preserves thirteen sites of prehistoric Native American occupation and eighteen sites of Euro-American settlement and industry. There are no historic buildings within the District. Rather, it is dotted with abandoned cellarholes (some of which are only visable when the water is low) and various stone artifacts. The District is hardly in a pristine state. "Areas of major disturbance" include "house lots, landscaped areas, railroad cut and fill, powerlines and roads; a new hydro-electric facility on the east side of the river is now under construction by state and federal agencies." National Register Nomination Forms, continuation sheet #14, Item 7, page 14.

In a letter addressed to Duncan Pearson, Highway Design Engineer for the New Hampshire Department of Public Works and Highways, State Historic Preservation Officer George Gilman wrote in regards to the Lochmere District:

> Although the site within the proposed corridor is potentially eligible for the National Register of Historic Places, and has been included in an Archaeological District Nomination, it is the opinion of the Historic Preservation Office that the significance of the site will lie in the data it contains and retrieval of the data is the recommended course of action... I request that this determination be construed as a finding of "no adverse effect on archeological resources".

State Historic Preservation Officer Gilman's determination was conditioned upon the New Hampshire Department of Public Works and Highways and the Federal Highway Administration including four commitments in the Final Environmental Impact Statement for the project; the gist of those commitments involved the recovery of historically significant artifacts from the

District prior to construction on the bypass. Those commitments were, in fact, included in the Final Environmental Impact Statement.

In a letter dated December 30, 1980, Mr. F.T. Comstock, Jr., Division Administrator of the United States Department of Transportation, wrote in response to Mr. Gilman's letter:

> We concur, based on available information and the State Historic Preservation Officer's position, that a finding of "No Adverse Effect" is appropriate and that Section 4(f) would not be applicable.

The Final Environmental Impact Statement for the project was completed in June, 1981. That statement concluded that there were no properties within the route of the proposed bypass which would require preparation of a section 4(f) statement. The Final Environmental Impact Statement further concluded that construction of the bypass would have no adverse effect on archeological resources if an appropriate resource recovery program was implemented prior to construction in the Lochmere District.

Eighteen months after the Final Environmental Impact Statement was completed, the Secretary of the Interior added the Lochmere Archaelogical District to the National Register of Historic Places.

Plaintiffs filed suit in this court on May 9, 1983. They seek to enjoin further work on the project until such time as the Secretary of Transportation, in compliance with section 4(f), determines that there is no prudent and feasible alternative to the use of land from the District. Insofar as the Secretary of Transportation has refused to conduct a section 4(f) study and has grounded her refusal on 23 C.F.R. §771.135 (f)(1), the plaintiffs' have also requested a declaratory judgment to the effect that regulation is void.

II. DISCUSSION

A.

As this case revolves around the disputed applicability of section 4(f), the court begins its discussion with an examination of the statutory language itself. Section 4(f) provides, in full:

> (a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.
>
> (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activites or facilities.
>
> (c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if —
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. §303

Similarly, section 18(a) of the Federal-Aid Highway Act of 1968 provides, in essentially identical language:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the country wise and public park and recreational lands,

wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands transversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife or waterfowl refuge of national, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and water fowl refuge, or historic site.

23U.S.C. §138.

Section 4(f), embodied as it is in the very enabling legislation which established the Department of Transportation and delineates the scope of Secretary Dole's authority, can only be read as imposing an explicit limitation on her powers to act where the consequences of her actions would result in the use of land from "protected" properties. Both section 4(f) and section 18(a) provide "clear and specific directives" to this effect. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 411 (1971). Thus, whenever a federal, state or local official with the jurisdiction to do so designates a particular area as an historic site, the Secretary of Transportation is prohibited from approving a federally funded project which would require the use of land from that historic site until she first prepares a section 4(f) statement concluding that there is no prudent and feasible alternative to the use of that land. The language of the statute is clear, unambiguous, and does not lend itself to any other interpretation.

Citizens to Preserve Overton Park v. Volpe, supra, involved the proposed construction of a highwy through a public park. Referring to section 4(f) – which affords the same protection to both parks and historic sites – the Supreme Court wrote, "this language is a plain and explicit bar to the use of federal funds for construction of highways through parks – only the most unusual situations are exempted." 401 U.S. 401, 411 (1971). Likewise, the Ninth Circuit has written that "under section 4(f)'s disjunctive language, if any of the officials having jurisdiction to determine that a site has national, State, or local historic significance, so decides then section 4(f) applies." *Stop H-3 Ass'n v. Coleman,* 533 F.2d 434, 441 (9th Cir. 1976). See also *Coalition for Canyon Preservation v. Bowers,* 632 F.2d744 (9th Cir. 1980); *Coalition for Responsible Regional Development v. Brinegar,* 518 F.2d 522 (9th Cir. 1975).

There can be no doubt that the Secretary of the Interior is an official with the jurisdiction to determine that a site has national, State, or local historical significance. Towards implementing our national policy of historic preservation, Congress has authorized the Secretary of the Interior to "expand and maintain a national register of districts, sites, buildings, structures and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register." 16 U.S.C. §470 (a)(1). The National Register serves as a "convenient guide to properties which should be preserved." H.R. Rep. No. 1916, 89th Cong., 2d Sess., reproduced at 1966 U.S. Code Cong. & Admin. News pp. 3307, 3310.

The Secretary of the Interior, in turn, has promulgated "National Register Criteria" to determine the eligibility of particular properties nominated for inclusion on the National Register. In part, those criteria provide as follows:

> The quality of significance in American history, architecture, archaeology and culture is present in districts, sites, buildings, structures and objects of State and local importance that possess integrity of location, design, setting, materials, workmanship, feeling and association and:

(a) That are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) That are associated with the lives of persons significant in our past; or

(c) That embody the distinctive characteristics of type, period, or method of construction, or that represent the work of a master, on that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) That have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. §60.6

In the instant case, the Secretary of the Interior determined that the Lochmere Archaeological District satisfied the first and fourth of those criteria and so approved its inclusion on the National Register as an historic site of State significance. "Since the Interior Secretary is the only official authorized to name properties to the National Register, we have no doubt that he has 'jurisdiction' to determine whether properties have state or local historic significance." *Stop H-3 Ass'n v. Coleman, supra,* at 441.

Having concluded that the Secretary of the Interior is an official with jurisdiction to determine that a site has historical significance and that he has, in fact, made such a determination in the instant case, it would appear that the operative language of section 4(f) has been satisfied and that section 4(f) applies to the Lochmere Archaeological District. At this point, the court turns to examine 23 C.F.R. §771.135 (f)(1) to determine whether that regulation somehow alters or upsets this analysis.

B.

23U.S.C. §315 authorizes the Secretary of Transportation to promulgate all rules and regulations necessary to carry out her multitudinous duties. Pursuant to that grant of authority, 23 C.F.R. §771.135 (f)(1) was promulgated in December 1980. That regulation provides:

> Section 4(f) applies to all archaeological sites on or eligible for inclusion on the National Register, including those discovered during construction, unless the Administration, after consultation with the state Historic preservation Officer and the advisory Council on Historic Preservation, determines that the archaeological resource is important chiefly for the information it contains and has minimal value for preservation in place. Such archaeological resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 C.F.R. Part 800.

Plaintiffs' challenge to the validity of 23 C.F.R. §771.135 (f)(1) is a case of first impression. As with any regulation promulgated by an executive department pursuant to a grant of authority from the Congress, 23 C.F.R. §771.135 (f)(1) is presumptively valid and entitled to judicial deference. *Hoffenberg v. Kaminstein,* 396 F.2d 684 (C.A.D.C. 1968), *certiorari denied,* 393 U.S. 913. For the purpose of ruling on the disputed validity of this regulation, the regulatin must be measured against the Act of Congress it was designed to implement.

> Where the empowering provision of a statute states simply that the agency may "make... such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is reasonable related to the purposes of the enabling ligislation. *Thorpe v. Housing Authority of the City of Durham,* 393 U.S. 168, 280-281 (1969). See also, *American Trucking Assn's v. United States,* 344 U.S. 298 (1953).

Mourning v. Family Publications Service, Inc, 411 U.S. 356, 369 (1973). Conversely, "a regulation which operates to create a rule out of harmony with the statute is a mere nullity." *Pacific Gas & Electric Co. v. United States*, 644 F.2d 1133, 1136 (9th Cir. 1981). See also, *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1935); *General Electric v. Gilbert*, 425, U.S. 125, 140-142 (1976); *Security and Exchange Commission v. Sloan*, 436 U.S. 103 (1978)

The court has already noted its belief that the Secretary of the Interior's decision to include the Lochmere Archaeological District on the National Register of Historic Places invokes all of the protections section 4(f) was designed to afford. Insofar as the Secretary of Transportation's regulation would act, in this case, to strip the District of those protections and relieve the Secretary of Transportation from preparing the type of statement section 4(f) requires, the regulation is not only "out of harmony" with the Act of Congress, it is in direct opposition to the Act. This is not to say that the regulation is entirely illogical or without merit, for if the validity of a regulation were to be decided on the basis of its sensibilities 23 C.F.R. §771.135 (f)(1) might well pass. However, the regulation is in conflict with the judgment of the Congress as expressed in the language of section 4(f) and would act to circumvent an explicit limitation imposed on the Secretary of Transportation's authority by the Congress; as such, the regulation must be considered void.

III

Plaintiffs have requested relief in the form of a permanent injunction and a declaratory judgment. The decision to grant either a permanent injunction or a declaratory judgment is one which is committed to the sound discretion of the court. See *Lemon v. Kurtzman*, 411 U.S. 192 (1973) and *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942).

The permanent injunction represents the strong arm of this court's equity jurisdiction. The primary prerequisite for the issuance of such an injunction is a finding that the plaintiff is being

threatened by some injury for which he has no adequate legal remedy. Wright & Miller, *Federal Practice and Procedure:* Civil §2942. "The injury contemplated must be real, not fancied; actual, not prospective; and threatened, not imagined." *Association of Professional Personnel v. Radio Corp. of America,* 183 F. Supp. 834, 839 (D.C.N.J. 1960). Other interests must be balanced, among them, the hardship on the plaintiff if relief is denied as opposed to the hardship to the defendant if it is granted. Wright & Miller, *Federal Practice and Procedure:* Civil §2942. Having considered all the evidence presented, this court concludes that the proposed bypass of US-3 NH 11 constitutes a real threat of irreparable injury to the Lochmere Archaeological District. Accordingly, a permanent injunction, attached to this opinion, shall be issued.

It is now long settled that in proper circumstances this court is empowered to render a declaratory judgment. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937). Again, the decision whether to render such a judgment is one squarely committed to the discretion of the court. *Brillhart v. Excess Ins. Co. of America, supra.* A declaratory judgment is only proper in those instances where a real case or controversy is present. *Aetna Life Ins. Co. v. Haworth, supra; Eccles v. People's Bank of Lakewood Village,* 333 U.S. 426 (1948); *Golden v. Zwickler,* 394 U.S. 103 (1969). The court is satisfied that the instant case presents a real "case or controversy" as those words are used in Article of the United States Constitution. Whereas the federal defendants have grounded their defense of this action almost exclusively on the professed validity of 23 C.F.R. §771.135 (f)(1), the court has no alternative but to rule on the merits of that regulation. Accordingly, the court holds that the challenged regulation, 23 C.F.R. §771.135 (f)(1), is in conflict with and would act to circumvent the affirmative restrictions imposed upon the Secretary of Transportation's authority by an Act of Congress now codified as 49 U.S.C. §1653(f). As the challenged regulation is out of harmony with the Act of Congress and cannot be said to be reasonably related to furthering the objective of that Act of Congress, 23 C.F.R. §771.135 (f)(1) is hereby declared void.

Plaintiffs have further requested an award of attorneys fees. The court will hold its ruling on that issue in abeyance pending the receipt of memoranda from the parties. The parties will have 10 days from the date of this order in which to submit those memoranda.

FINDINGS AND RULINGS

The court finds that irreparable harm will occur to the Lochmere Archaeological District if the proposed Franklin to Laconia, New Hampshire bypass of US 3-NH 11 is constructed without first completing a section 4(f) statement finding that there is no prudent and feasible alternative to the use of land from the District.

The court rules that a section 4(f) statement is required by §4(f) of the department of Transportation Act of 1966, as amended 49 U.S.C. §303 and §18(a) of the Federal-Aid Highway Act of 1968, as amended 28 U.S.C. §138.

The court rules that Department of Transportation regulations 23 CFR §771,135 (f)(1) is declared to be void as it is in conflict with the Acts of Congress now codified as 49 U.S.C. §303 and 28 U.S.C. §138.

A permanent injunction will, therefore, issue forthwith and is attached as an Appendix to this opinion.

August 20, 1983

Martin F. Loughlin
U.S. District Judge

Edward A. Haffer, Esq.
United States Attorney
Office of the Attorney General

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Town of Belmont, et al.

v.

Elizabeth Dole, et al.

C83-241-L

PERMANENT INJUNCTION

This cause came on to be heard on plaintiffs' suit for a permanent injunction, and the court having considered the complaint, the memoranda presented in support and opposition therto, and having heard oral evidence in open court, and it appearing to the court after careful deliberation that the defendants are actually engaged in committing and will continue to commit the acts set forth below, to the irreparable injury of the Lochmere Archaeological District, and the court having made and filed its findings of fact and conclusions of law it is

ORDERED that the defendant Elizabeth Dole, her agents, servants, employees, and all persons in active concert and participation with her are hereby permanently restrained and enjoined, pending the completion of a section 4(f) statement concluding that there is no prudent and feasible alternative to the use of land from the Lochmere Archaeological District, from in any manner taking any action to effectuate federal participation, by providing funding ot otherwise to commit the United States Government or any of its departments or agencies to such participation, in the highway construction described or proposed in the document entitled "Final Environmental Impact Statement, Relocation of U.S. 3-NH 11, Franklin-Laconia, New Hampshire issued by the United States Department of Transportation Federal Highway Administration, numbered FHWA--NH--EIS--77--02--F, such

proposed construction being of approximately 12 miles of highway U.S.3 – N.H. 11 from Franklin, New Hampshire to Laconia, New Hampshire.

August 22, 1983

Martin F. Loughlin
U.S. District Judge

Edward A. Haffer, Esq.
United States Attorney
Office of the Attorney General

§18(a) Federal-Aid Highway Act of 1968 (23 U.S.C. §138)

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section, the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.